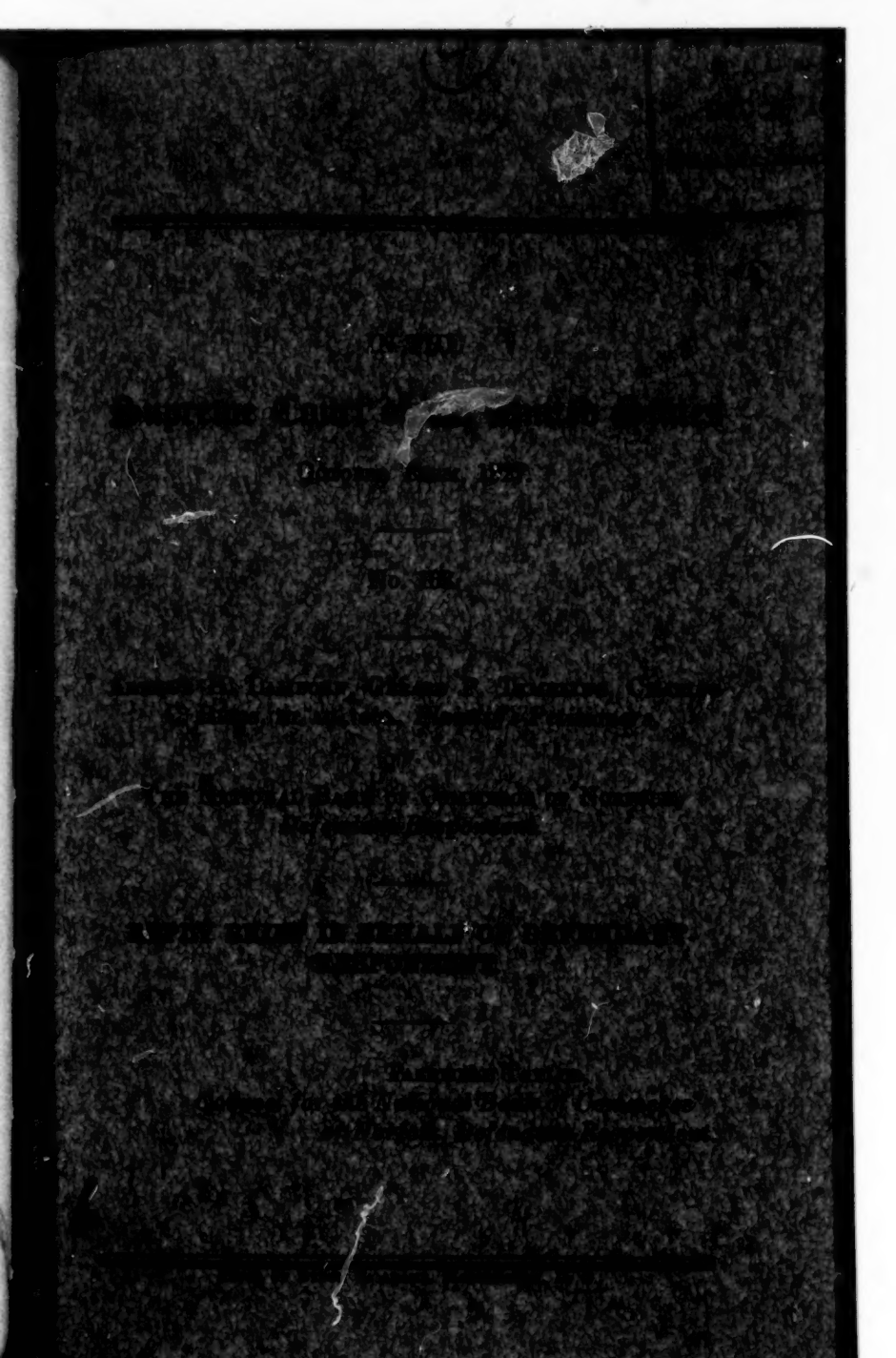

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1927.

No. 163.

ARTHUR H. LAMBORN, GERARD P. TAMELING, CHARLES C. RIGGS, ET AL., etc., *Plaintiffs-Petitioners,*

v.

THE NATIONAL BANK OF COMMERCE OF NORFOLK, *Defendant-Respondent.*

REPLY BRIEF IN BEHALF OF DEFENDANT-RESPONDENT.

I. INTRODUCTION.

In the three former briefs which have been filed with this Court by counsel for Plaintiffs-Petitioners, there appears more by way of suggestion than otherwise that reliance may be placed upon a point not directly urged, but which was unsuccessfully urged by Plaintiffs-Petitioners on the second trial of this case in the

District Court and upon the second appeal in the United States Circuit Court of Appeals for the Fourth Circuit. On the second trial the Plaintiffs-Petitioners, who will be hereinafter referred to as the Plaintiffs, endeavored for the first time to prevent the Defendant-Respondent, who will be hereinafter referred to as the Defendant, from relying upon the defense that there was a failure to make shipment during the months of August-September, 1920, from Java by steamer or steamers to Philadelphia, on the alleged ground that in declining to pay the letter of credit, the defendant did not state this as one of the grounds for its declination. This contention of the Plaintiffs was overruled both by the trial court and the Circuit Court of Appeals for the Fourth Circuit on the second appeal.

In order that the Defendant's position may be fully understood if any effort is made to urge this point by the Plaintiffs, this brief is prepared and filed for consideration in that event.

II. THE DEFENDANT WAS ENTITLED TO MAKE THE DEFENSE THAT THE SUGAR TENDERED WAS NOT SHIPPED IN ACCORDANCE WITH THE LETTER OF CREDIT.

The Plaintiffs on the second trial asserted for the first time that the Defendant endeavored to mend its hold by asserting as a defense an objection, which it did not assert or rely upon at the time of presentation and non-payment of the letter of credit. We shall first discuss the facts bearing on this objection before entering upon a discussion of the law. It is our belief that the facts of the case do not call for the application of the principle of law which the Plaintiffs seek to

invoke, and that the principle of law which they seek to invoke, as will be hereafter observed from the authorities, does not justify the conclusion they attempt to draw.

The position of the Defendant throughout has been thoroughly consistent. It now claims and has always claimed both in its pleadings filed in May, 1921, and on both trials of this case, and on both hearings on appeal, as well as on the present hearing, that the Plaintiffs failed to live up to their contract.

A copy of the letter of credit is found on page 106 of the Record. It concludes with this significant language:

> "If impossible to comply with the conditions above stated, communicate with us before making shipment. The conditions embodied in this credit must be adhered to, otherwise payment will not be effected."

On December 27, 1920, the Bankers Trust Company wired The National Bank of Commerce (R., 139):

> "Lamborn has presented draft and documents covering 1000 bags sugar under your credit 105 account Southgate. Documents apparently in order. Have you arranged examine documents. Please wire."

To which the National Bank of Commerce replied on December 27, 1920 (R., 143):

> "Answering telegram we have convincing evidence that sugars tendered by Lamborn were not shipped from Java until October seventeenth maritime records show that ship on which loaded sailed from Samarang October eighth calling at Mascassar then Borneo and finally back to Samarang

from whence sailed for New York October seventeenth further that this ship was diverted to Philadelphia though originally intended for New York our credit specifically calls for shipment from Java August or September and Lamborn's failure to comply with this important requirement compels us refuse payment moreover our client has shown us letters indicating their sugars loaded on steamer Chifuke Maru which has never arrived."

On January 4, 1921, The National Bank of Commerce wired the Bankers Trust Company (R., 145), as follows:

"Replying to telegram are advised that terms of credit in favor Lamborn and Company not complied with. We decline payment."

On January 5, 1921, the Bankers Trust Company wrote Lamborn & Company (R., 145), in part, as follows:

"Please be advised that we have received a wire from the National Bank of Commerce, Norfolk, Va., advising us that they decline to make payment under the above credit. As under this credit we are only the paying agents of the National Bank of Commerce in Norfolk, we are obliged to follow their instructions and are returning to you documents covering a shipment under this credit tendered to us in your letter of December 23, 1920.

We suggest that you take the matter up directly with the National Bank of Commerce, Norfolk."

There is nothing in the record to indicate that this suggestion to take the matter up directly with the National Bank of Commerce was ever followed by Lamborn & Company.

On January 6, 1921, the Bankers Trust Company

telegraphed the National Bank of Commerce (R., 146) as follows:

> "Judge Burrough has vacated the order enjoining payment against presentation of documents under your credit number one hundred five order will be entered today to that effect please remit funds to cover at once as the documents are in order and any delay in not meeting payment will be most embarassing to yourselves and ourselves."

To which the National Bank of Commerce replied on January 7, 1921 (R. 146), as follows:

> "Southgate advises that expressed conditions of our credit number one hundred five have been grossly violated by sellers and declines to recognize payment of same in light of your repeated statements that you only acting as paying agent we cannot understand why you should feel embarrassed we reaffirm position outlined in our telegram January fourth to you."

On January 8th, 1921, the Bankers Trust Company wrote the National Bank of Commerce in part (R., 146), as follows:

> "In accordance with our exchange of telegrams of January 6th and 7th, we have advised Lamborn & Company of your refusal to permit payment of their draft on us under the above credit for $48,009.81, covering shipment of sugar to T. S. Southgate & Company."

In the protest of the draft (R. 147), it is shown that the answer accompanying the refusal was "will not pay." It will thus be seen from the entire correspondence that the refusal to pay the draft or the letter

of credit was placed upon the ground that the Plaintiffs had violated their contract. In the letter of January 5th from Bankers Trust Company to Lamborn, the latter were advised that The National Bank of Commerce declined to make payment of the letter of credit, and the Bankers Trust Company suggested that Lamborn take up the matter directly with the National Bank of Commerce, which was never done.

Throughout the correspondence between the National Bank of Commerce and the Bankers Trust Company there are repeated statements to the effect that Lamborn had not complied with the terms of the letter of credit. In addition to these general statements in the telegram of December 27, 1920, from the National Bank of Commerce to Bankers Trust Company (R. 143), the specific objection among others is stated:

> "That this ship was diverted to Philadelphia though originally intended for New York."

N. Nelson Keen, a member of the firm of Lamborn & Company, testified at both trials. On the first trial when this question was not raised by the Plaintiffs, he testified as follows (R. 45):

> "On January 6th, 1921, I went to the Bankers Trust Company and saw Mr. Kent, a Vice-President, and also Mr. Smith, a Vice-President. I pointed out to Mr. Kent that the injunction against this letter of credit had been vacated by a court order and the documents were now in order for payment under the letter of credit. We had some little discussion there about it, the exact words of which I don't remember, but Mr. Kent told me that they had been instructed by The National Bank of Commerce of Norfolk, Va., not to pay the

> credit and as they were only the paying agents and had not confirmed the credit to us, they would have to abide by the instructions received from The National Bank of Commerce, their principal, and after that discussion I went back to our office."

On the second trial when this question was for the first time raised, Mr. Keen again testified, and, for the first time, and, then only when having omitted reference to the matter on his principal examination, did he, when recalled to the stand near the close of the second trial, state that only the question of clearance had been brought up during the conversation on January 6th, 1921, and that his firm had relied upon that alone in their subsequent conduct with reference to the matter. (R. 154.)

This conclusion is hardly borne out by the subsequent testimony of Mr. Keen, for he conclusively shows that all other sugar, which might have been tendered on account of the Southgate contract, was already covered by other contracts with other parties, and that these other parties took and paid for every bag thereof (R. 154, 155). Consequently the Plaintiffs have sustained no damage, because they had no sugar available which could have met the requirement raised by the Defendant's construction of the letter of credit.

But beyond all this, a party to a suit is not permitted upon a second trial to take a position inconsistent with that taken by him on the first trial. The record bears out the statement that Mr. Keen, one of the Plaintiffs, was perhaps the most important witness testifying on their behalf. It was he who conducted the negotiations with the Bankers Trust Company, and

it is but reasonable to suppose that if the ground of non-payment as assigned by the Bankers Trust Company had gone only to the question of clearance, he would have recalled the same and mentioned it in his first testimony when the matter was clearer in his mind. There is nowhere in the record of the first trial any testimony of Mr. Keen or anyone else that the refusal to pay was placed upon any one specific ground in such a manner as to preclude the urging of others.

We, therefore, feel that the Plaintiffs having lost on their original position, which was that they had complied with their contract, should not now be permitted to mend their hold by urging an additional ground, which was never mentioned on the original trial, in spite of the fact that most thorough and complete testimony was given at that trial as to every branch of the case. We believe that an effort of this kind by one of the parties to the litigation is tantamount to an inconsistent position. The Court and jury on the former trial had every reason to assume that every branch of the case had been thoroughly developed in the Plaintiff's testimony, including certainly the reason, if it were given, why the letter of credit was not paid.

We would call the attention of the Court to the opinion in *Smith v. Boston Elevated Ry. Co.*, 184 Fed. 387, and especially the following quotation therefrom:

> "In the present case, the Plaintiff upon the former writ of error had a full hearing upon the question of her legal rights upon the state of facts upon which she rested before a jury and before this court. If, after an adverse decision of this court she is at liberty to change her own testimony at will, then there is no practical limit to litigation."

It will thus be seen that there has been no effort on the part of the Defendant to mend its hold. In answer to the Plaintiffs' notice of motion for judgment, and long before the first trial, the Defendant pleaded the general issue and stated as one of its grounds of defense that the shipment had not been made from Java to Philadelphia in accordance with the terms of the letter of credit. (R. 4.)

Under the Virginia practice, which is applicable to this case under the terms of the Conformity Act, even though the Defendant had stated no grounds of defense, it was still incumbent upon the Plaintiffs to prove their case, which would have necessarily required proof that shipment was made in accordance with the terms of the contract. If the Plaintiffs had failed to do this, without any action on the part of the Defendant, their case would have failed from its inherent weakness. The same consequence follows when, at the end of the Plaintiff's case, a motion is made for a directed verdict. At that point the Defendant had introduced no evidence at all. It had up to that point relied upon no affirmative defense; it stood upon its rights, with the burden on the Plaintiffs to establish a case before it was called upon to interpose any defense.

That the present position of the Plaintiffs is an after-thought is amply shown by the record. This litigation was started by a notice of motion for judgment filed by the Plaintiffs on April 7th, 1921, and trial was had resulting in a directed verdict for the Plaintiffs. To the judgment then entered a writ of error was granted by the Circuit Court of Appeals, and on appeal the judgment of the lower Court was reversed and the case sent back for another trial, which was held on June 5, 1925, or over four years after the

original institution of the action, and it was not until the latter date, namely, June 5, 1925, that the present question was ever raised by the Plaintiffs.

These Plaintiffs are astute business men, they are represented by capable counsel, who have specialized in litigation of this description, and it is only justice to these gentlemen to say that had there been any merit in the point now urged, or had the interest of their clients been jeopardized by the Defendant's action, they would hardly have waited four years and two months, and only then after they had failed in their original theory of the case, to have brought the matter to the attention of the Court, when their conduct of this litigation displays their experience, capability and comprehensive grasp of every essential involved.

Judge Groner, who presided at both trials, concluded that the Plaintiffs had sustained no injury by reason of any act of the Defendant; that the Defendant was not engaged in an effort to mend its hold, and that its position had been consistent throughout. He said (R. 163):

> "Now, the Plaintiff urges that there is a new element in this case, introduced by the production of the letter passing between the defendant Bank of Commerce and the Bankers Trust Company of New York which is described in those letters as the paying agent of the local bank. I have carefully listened to those letters, the contents of them and the point urged by counsel for the Plaintiff that there was an election of remedies and rights, that the Defendant in denying the compliance with the contract or carrying out of the contract put the ground upon something other than the ground it now urged in its defense. I don't think the letters bear that construction. I don't think it is possible to give them that slant. I think they are

clearly not susceptible of any other conclusion than that while other grounds of defense were urged as a justification for refusal to accept the sugar, the ground now urged was among those and there is no limitation or selection or election of a particular defense and a waiver of all others, so that in the view that I now take of this case, the situation is as it was at the last trial plus the authoritative declaration of the Circuit Court of Appeals that what admittedly was done was not a compliance with the terms of contract. So that it becomes my duty in this case at this time, under those circumstances, to grant the motion of the Defendant's attorney for an instructed verdict in favor of the Defendant."

The point was subsequently urged in the United States Circuit Court of Appeals on the second appeal, and Judge Rose disposed of it in the following language (R. 207):

"The Plaintiffs say that Defendant waived its right to rely upon the defense which we held decisive in its favor. The argument is, the Defendant when it refused to honor the letter of credit assigned reasons for its conduct, and among them it did not include the fact that the sugar had been shipped from Java to New York and not to Philadelphia. It requires a rather narrow construction of what Defendant did and said to justify a holding that the objections it made did not cover the defense upon which it now relies. The claim of the Plaintiffs that if in the first instance their attention had been more pointedly called to it, they could and would have tendered sugar which had been originally consigned to Philadelphia, depends upon doubtful questions of law and speculative assumptions of fact. It is also worthy of note that while Plaintiffs insist that Defendant may not amend or supplement its out of Court statement of

its grounds of defense, they claim that they are free to raise a point at the second trial which they did make at the first. In the former trial below and in this Court, the Plaintiffs treated the defense in question as properly before the Court. They as well as their adversary argued it elaborately. It is true they said it was bad in law, but no hint was given that the Defendant was estopped from setting it up. It was given the full and painstaking consideration as well of the District Court as of this. Under these circumstances the learned Judge below did not err in rejecting the contention now made."

III. EVEN THOUGH PLAINTIFFS COULD HAVE OBJECTED TO DEFENDANT'S GROUND OF DEFENSE WHEN ORIGINALLY MADE IT WAS TOO LATE SO TO DO ON THE SECOND TRIAL.

As hereinbefore shown the defense that the Plaintiffs had not complied with the terms of the letter of credit was formerly pleaded prior to the first trial. This defense was stated in writing and was first filed on May 3, 1921. Thereafter on October 23, 1923, a supplemental statement of the grounds of defense was filed in the following words (R. 3):

"5. It relies upon the fact that the letter of credit upon which this action is brought provides as follows:

'Shipment to be made during August-September, 1920, at option of the sellers, from Java by steamer or steamers to Philadelphia.'

whereas, the fact is that the sugar tendered, in addition to not being of the character and quality designated in the letter of credit, was shipped on the Steamship 'West Cheswald,' whose destina-

tion at the time of shipment was Port Said, option New York, and which after sailing from Port Said to New York was diverted at the instance of the Plaintiffs on December 13th, 1920, to Philadelphia, it thus being apparent that the sugar in said vessel was never shipped from Java to Philadelphia within the months of August-September, 1920, and its ultimate destination until December 13th, 1920, was New York and not Philadelphia."

Thereafter the first trial was had in which no objection was made by the Plaintiffs to the Defendant relying upon this ground of defense, it being assumed by the Plaintiffs, in which assumption they were sustained by the Court in directing a verdict in their favor, that the defense was not a valid one. On appeal the lower Court was reversed, and it was held that the defense was valid. During all of this time the Defendant's right to interpose this defense was never raised, though the record was as comprehensive and complete, if not more so, than it was on the second trial. It was not until the day of the second trial in June, 1925, that the Defendant's right to rely upon this defense was ever questioned by the Plaintiffs.

Our contention, therefore, is that upon the first trial the action of the Court, in determining that the defense relied upon by the Defendant was not a valid one, necessarily comprised the question of the right to make it, nothing being said to the contrary, and certainly the action of the Circuit Court of Appeals on the first appeal, in holding that the defense was a valid one, necessarily embodied the conclusion that the Defendant had not estopped itself from making it, especially in view of the fact that the Plaintiffs raised no objection on that ground.

The pleadings and the evidence on the former trial

permitted the making of this objection to this defense as completely as the record in the present instance, and yet it was not made.

A party to litigation will not be permitted to make his case by piecemeal, especially when he has been disappointed in the position he has taken on the first trial.

This position is succintly stated in *Sun Company vs. Vinton Petroleum Company,* 248 Fed. 625:

> "The writer understands that questions which by an appeal have been brought before an appellate court for its decision cannot again be insisted on when the case comes before the same court on a subsequent appeal; that a party cannot create an exception to this rule by calling to the attention of the appellate court, when the case is first before it, some only of the questions which the record presents for its decision, reserving other questions, also presented by the record, for a second presentation to the trial court in the event of the remandment of the case to it, or to the same appellate court on a subsequent appeal; and that a subsequent appeal brings up nothing but the proceedings subsequent to the mandate."

There can be no question but that the point now raised might have been adjudicated on the former hearing; that being true there must be some end to this litigation, and the Plaintiffs are necessarily foreclosed by the former decision.

In *Burns vs. Cooper,* 153 Fed. 151, Mr. Justice Van Devanter, then Circuit Judge, in a somewhat similar case, said:

> "As the Circuit Court properly interpreted and followed our former opinion and mandate, that must end the controversy; for our former decision, like the final decision of every court which has

> jurisdiction of the matters and parties it judges, rendered every question which was actually determined upon that appeal, and ever question which might have been then raised in opposition to the decision, *res judicata* between the parties to it as respects the claim or cause of action there litigated."

In *Roberts vs. Cooper*, 20 How. 481, 15 L. Ed. 973, the Court said:

> "It has been settled by the decisions of this court, that after a case has been brought here and decided, and a mandate issued to the court below, if a second writ of error is sued out it brings up for revision nothing but the proceedings subsequent to the mandate. None of the questions which were before the court on the first writ of error can be reheard or examined upon the second. To allow a second writ of error or appeal to a court of last resort on the same questions which were open to dispute on the first, would lead to endless litigation."

In the case of *United States Trust Co. vs. New Mexico*, 183 U. S. 535, 46 L. Ed. 315, 22 Sup. Ct. Rep. 172, Mr. Justice Brewer, speaking for the Court, said:

> "The District Court dismissed the intervening petition on the ground that it presented no claim against the property or the parties. The reversal by this Court of such order is an adjudication that, upon the face of the petition, a valid claim was presented, and is conclusive of such *prima facie* validity, not merely against objections which were in fact made, but also against those which might have been made."

In *New Mexico vs. Board of County Commissioners*, 22 N. M. 562, 166 Pac. 906, 1 A. L. R. 720, it is said:

> "In fact, the overwhelming weight of authority is to the same effect, and, were this not the rule, it would be possible for a party objecting to a complaint or answer, or other pleading, on various grounds, to split up his grounds of objection, and have the same determined by the appellate court by piecemeal, and litigation would never be brought to an end."

If additional authority is needed for this principle, particularly so far as the uniform rule followed in the Federal Courts is concerned, reference is made to the note in 1 A. L. R. 725, *et seq.*, in which the rule is thus stated:

> "The general rule, supported by the great weight of authority, is to the effect that questions which might have been, but were not, raised or presented on a prior appeal, or error, will not be considered on a subsequent appeal, or error; or, in other words, that, where the prior judgment was on the merits, nothing is before the court on a subsequent appeal, but the proceedings subsequent to the first mandate, all matters occurring prior thereto, and which could have been adjudicated on the former hearing, being regarded as controlled by the 'law of the case' rule."

It was, therefore, too late for the Plaintiffs to question on the second trial the Defendant's right to interpose this defense to the action.

IV. THE RULE OF LAW INVOKED BY PLAINTIFFS IN ERROR BEING FOUNDED ON ESTOPPEL IS NOT APPLICABLE UNDER THE FACTS OF THIS CASE.

The Plaintiffs take the position that the Defendant, having, as they claim, assigned but one objection as a

ground for refusing to pay the letter of credit, is confined to that ground in the trial of the case. For the reasons we have heretofore given, we believe that the rule cannot be invoked by the Plaintiffs in error, but we further feel, even though it could be invoked at this time, the Plaintiffs not having been misled to their detriment by the Defendant's conduct, the Defendant would not be precluded from urging any additional grounds of objection.

Plaintiffs cite the case of *Railway Company vs. McCarthy,* 96 U. S. 258, 24 L. Ed. 693, in which the Court uses the following lnaguage:

> "Where a party gives a reason for his conduct and decision touching anything involved in a controversy, he cannot, after litigation has begun, change his ground, and put his conduct upon another and a different consideration. He is not permitted thus to mend his hold. He is estopped from doing it by a settled principle of law."

It will be seen that the Supreme Court bases this rule entirely upon the idea of estoppel, and it is needless to say that a person can only invoke this doctrine when he has suffered damage.

The case of *Everett vs. Saltus,* 15 Wend. 474, cited in Railway Company vs. McCarthy, (*supra*) well illustrates this element of equitable estoppel. It was there held that a party, who upon being called upon to account for goods which had come to his hands, set up title in himself independent of a lien, could not afterwards when an action was brought against him defeat a recovery by setting up at the trial a right to retain the goods on the ground of a lien. This conclusion was thoroughly sound, as it would not be permissible for a

party to occupy inconsistent positions through the course of litigation. Even assuming for the sake of argument that the Plaintiffs were not advised at the time of the presentation of the draft of all of the reasons which might have been urged for not paying the same, this would not preclude the Defendant from setting up additional reasons at the trial, provided they were not inconsistent with the original reasons, if the Plaintiffs had not been misled to their detriment by treating the original reason assigned as the only one for not carrying out the contract.

The Supreme Court of the United States in *Bierce vs. Hutchins,* 205 U. S. 340, 51 L. Ed. 828, lays down the rule as follows:

> "The fact that a party, through mistake, attempts to exercise a right to which he is not entitled, does not prevent his afterwards exercising one which he had and still has unless barred by the previous attempt."

There is nothing inconsistent in a defense based upon an alleged failure of the vessel to clear at a certain time, and another defense based upon the fact that the vessel's destination at the time of sailing was not the port contemplated by the contract.

In *Campbell vs. Fetty,* 271 Fed. 673, the Court recognizes and applies the rule for which we contend, saying:

> "An estoppel also presupposes liability, and that the party relying upon it has been misled into such action that he will suffer injury, if the estoppel is not declared. 10 R. C. L. 697. The case of *Railway Co. vs. McCarthy,* 96 U. S. 258, 24 L. Ed. 693, relied upon by Plaintiff in error, is not in point. The doctrine of that case forbids a litigant

to mislead his adversary by basing conduct upon one ground and then defending upon another."

United Cent. Life Ins. Co. vs. Drake, 214 Fed. 547, states the rule in this language:

"Nor was it a fatal objection to the insurance company's maintenance of its lien for the $10,080 upon the surplus fund by subrogation that it had endeavored to collect this amount by the foreclosure of its mortgage of December 20, 1907, and had been defeated by the bankruptcy of McKillip. The rule available in some circumstances, that where a Defendant has given a specific reason for his refusal to perform his contract or discharge his duty may not, after suit has been commenced to compel his performance in reliance upon his statement of his reason, change his position and successfully defend on another ground (*Railway Company vs. McCarthy,* 96 U. S. 258, 267, 24 L. Ed. 693; *Ballou vs. Sherwood,* 32 Neb. 666, 690, 49 N. W. 790, 50 N. W. 1131; *State vs. Board of Commissioners,* 60 Neb. 566, 570, 83 N. W. 733), is not applicable to this case: First, because it is founded on an equitable estoppel, and while the insurance company brought a futile suit to foreclose the mortgage of December 20, 1907, the record fails to convince that it ever specified or misled the trustee into the belief to his injury that that mortgage was the only reason it would not surrender the three forties; second, because the rule is inapplicable to cases where the party against whom it is invoked has independent affirmative causes of action and remedies for the wrong it has suffered; and, third, because the controlling rule in cases of the class to which this suit belongs is that even where the victim of a wrong has inconsistent remedies, and he is doubtful which is the right one, he may pursue any or all of them until he recovers through one, and in the absence of facts creating

an equitable estoppel, and there are none in this case, his prosecution of a wrong remedy to defeat will not estop him from subsequently pursuing the right one to victory."

In *Second National Bank of Allegheny vs. Lash Corporation,* 299 Fed. 372, the Court in discussing the McCarthy case, says:

"Viewing this statement as the whole of the rule, and regarding the principle of waiver as its basis, some courts have held that where a party justifies his conduct on a ground specifically stated he is deemed to have waived all other grounds, and there the matter ends. This may be a correct interpretation of the quoted expression, but this expression is not the whole of the rule. Having said that a party cannot change his ground after litigation has begun, the court, giving the reason for the rule, continued:

'He is not permitted thus to mend his hold. He is estopped from doing it by a settled principle of law. *Gold vs. Bank,* 8 Wend. (N. Y.) 562; *Holbrook vs. White,* 24 Wend. 169; *Everett vs. Saltus,* 15 Wend. 474; *Wright vs. Reed,* 3 Durnf. & E. 554; *Duffy vs. O'Donovan,* 46 N. Y. 223; *Winter vs. Coit,* 7 N. Y. 288.'

"The concluding words clearly indicate that the rule is founded on equitable estoppel. *Insurance Co. vs. Drake,* 214 Fed. 536, 547, 548, 131 C. C. A. 82. Accordingly, when a party, with full knowledge of the facts, as here (*Goodman vs. Purnell,* 187 Fed. 90, 109 C. C. A. 408; *Banco Nacional vs. Bank* (D. C.) 289 Fed. 169, 176), has selected and given one of several available reasons for his refusal to perform his contract or discharge his duty and after suit changes his position and seeks to rely upon the others, federal courts in this circuit, looking to the reason of the rule and keeping in mind the distinction between waiver and estoppel

(*Shaw vs. Spencer,* 100 Mass. 382, 395, 97 Am. Dec. 107, 1 Am. Rep. 115), examine the record to find whether it appears that the party has misled his adversary or induced him to alter his position to his prejudice or has himself reaped an advantage by failing seasonably to assert the defense subsequently made—in other words, whether the facts raise an estoppel."

Galla vs. Hamburg, 233 Fed. 425, 426, recognizes the same principle:

"There is one point advanced requiring further consideration. It is contended that because the Defendant, when presented with Plaintiff's demand (nearly a year before action brought), declined settlement in a letter containing the suggestion (it was no more) that the loss complained of resulted from sea water, therefore Defendant is estopped from defending in this suit on the ground that it was a fresh-water tank that by leakage injured cargo. Undoubtedly a part of the general rule is as stated in *Railroad Co. vs. McCarthy,* 96 U. S. 258, 24 L. Ed. 693, that:

'Where a party gives a reason for his conduct and decision touching anything involved in a controversy, he cannot, after litigation has begun, change his ground, and put his conduct upon another and different consideration.' This court has considered the decision just cited in *Goodman vs. Purnell,* 187 Fed. 94, 109 C. C. A. 408, and the subject in *Burton vs. Berthold,* 166 Fed. 416, 92 C. C. A. 168. See also *Hine vs. New York, etc., Co.,* 73 Fed. 852, 20 C. C. A. 63. In each of these cases we have expressly or impliedly insisted upon the reason of the rule being apparent in order to justify its application." * * * "Estoppel *in pais* only arises from such acts and declarations as by reasonable intendment induce another to alter his position injuriously to himself, or enable the first party to reap a personal benefit from what was said

or done. This case falls far short of measuring up to the rule. There is no evidence that Plaintiff relied upon the statement made, or changed his position by reason thereof of which perhaps the best evidence is the form of the complaint, which assigns an act of negligence having no necessary or apparent relation to water, either fresh or salt."

Quinn vs. Olsen, 298 Fed. 708, is also in point:

"Plaintiff contends, however, that the Defendant because of his statement made at the time of the tender is precluded from urging this failure as a defense.

In the case of *Railway Co. vs. McCarthy,* 96 U. S. 258, 24 L. Ed. 693, the Supreme Court of the United States said:

'Where a party gives a reason for his conduct and decision touching anything involved in a controversy, he cannot, after litigation has begun, change his ground, and put his conduct upon another and a different consideration. He is not permitted thus to mend his hold. He is estopped from doing it by a settled principle of law.'

"This principle of law is well settled, but it has no application in the instant case. Defendant in effect said because of the delay he had theretofore burned up his contract and notified the agent, and that after this long delay he should not be called upon to take the land when it had depreciated greatly in value. Defendant was not a lawyer, and he was not called upon to couch his refusal in legal phraseology. What he said was not susceptible of the construction that he refused to accept solely because of the depreciation of the value of the land, and was not inconsistent with the defense of failure to perform within a reasonable time."

We will conclude this branch of the discussion with the following quotation from the opinion in *Ketchum vs. Duncan,* 96 U. S. 659, 24 L. Ed. 868:

"Moreover, it is necessary to notice who sets up this plea of estoppel. An estoppel *in pais* does not operate in favor of everybody. It operates only in favor of a person who has been misled to his injury, and he only can set it up."

It will thus be seen from these well reasoned cases that the person setting up the alleged estoppel must show that the several positions taken by the opposing party were either inconsistent, or that reliance has been solely placed upon the first reason given, and that to permit other reasons to be afterwards given would cause damage to the party invoking the estoppel.

This rule, therefore, can have no application in the present instance, even though it had been seasonably invoked, and even though it might have been concluded by the jury that the question of clearance was the sole ground relied upon at the time payment of the letter of credit was refused, for the reason that the Plaintiffs were unable to take any step or to do any act that would have cured the objection as to the method of shipment.

An effort was made by Mr. Keen in his testimony (R. 154) to show that the required number of bags of sugar could have been delivered to Southgate & Company from the cargo of the "Washington Maru," but on cross-examination this effort completely fails. He said:

"I know what disposition was made of the entire cargo out of the 'Washington Maru.' The American Stores, Philadelphia, had 7,250 bags of the cargo of the 'Washington Maru,' the McMahon & Leib Company of Anderson, Indiana, had 400 bags. The Gammeter Commercial Company, 1,000 bags. A. Blanton Grocery Company, 1,100 bags; Jesse C. Stewart 281 bags, making a total of 9,931 bags. My recollection is that the balance of the

number of bags were used for filling, sweeping, etc.

It is a fact that disposition was made at Philadelphia of the entire sugar cargo of the 'Washington Maru,' that disposition was made pursuant to previous declarations of that sugar in the 'Washington Maru,' substitutions finally from the 'Chifuku Maru' from the 'Washington Maru.'

Q. So when the 'Washington Maru' landed on December 19th all of that sugar by reason of substitutions and designations had been allocated to the parties whose names you have read?

A. I don't say that it had because a great number of these people had objected to the substitution of the 'Washington Maru' for the 'Chifuku Maru' and wanted us to leave the sugar on the 'Chifuku Maru.'

Q. But it was finally taken by them, was it not?

A. Yes.

Q. Pursuant to these substitutions and designations?

A. Yes, sir.

Q. And that disposed of your entire cargo out of the 'Washington Maru?'

A. Yes, sir."

It thus appears that Mr. Keen knew the disposition that was made of the entire cargo of the "Washington Maru"; that all of this cargo was delivered to other customers of the Plaintiffs pursuant to contract, and that the same was paid for; that the "Washington Maru" arrived on December 19th, three days after the "West Cheswald," and that immediately upon her arrival tender was made of her entire cargo to the various parties named as subsequently taking it, and that this tender was kept alive from the time of the ship's arrival until the time of the delivery of the sugars to the various parties to whom they had been previously tendered; that previous to the arrival of the

vessel declarations of this sugar had been made, and that the sugar finally delivered to the various parties under their contracts was delivered pursuant to previous declaration, and pursuant to tender upon arrival of the vessel. It will thus be seen that the sugar out of the "Washington Maru," being the only sugar available, which complied with the terms of the letter of credit, so far as shipment was concerned, was all preempted prior to the arrival of the vessel at Philadelphia, and consequently, there was no way whereby the Plaintiffs could have used that sugar to meet the objection as to shipment, which applied to the cargo in the "West Cheswald."

Mr. Keen further states that the delivery of this sugar to Southgate & Company instead of to the parties with whom his firm had contracts would have made no difference in the final result, but would have simply changed the individuals, who finally received the sugar. (R. 158)

It will thus be seen that even though the evidence justified the conclusion (which it does not) that the exclusive reason given for not paying the letter of credit was based upon the question of clearance, still it conclusively follows that the additional reason even though subsequently urged for the first time (which we deny) is not inconsistent with the first reason, nor has it in any manner affected the Plaintiffs to their detriment. Therefore the rule is not applicable.

Respectfully submitted,

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